IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

REALTIME DATA LLC d/b/a IXO,	§	
Plaintiff,	§	**Civil Action No. 6:15-cv-468**
v.	§	**JURY TRIAL DEMANDED**
RIVERBED TECHNOLOGY, INC.,	§	
Defendant.	§	

JURY INSTRUCTIONS

1. Introduction

MEMBERS OF THE JURY:

You have heard the evidence in this case. I will now instruct you on the law that you must apply. It is your duty to follow the law as I give it to you. On the other hand, you the jury are the judge of the facts. Do not consider any statement that I have made during the trial or make in these instructions as an indication that I have any opinion about the facts of this case.

After I instruct you on the law, the attorneys will have an opportunity to make their closing arguments. Statements and argument of the attorneys are not evidence and are not instructions on the law. They are intended only to assist you in understanding the evidence and the parties' contentions.

1.1 General Instruction

A verdict form has been prepared for you. You will take this form to the jury room and when you have reached unanimous agreement as to your verdict, you will have your foreperson fill in, date, and sign the form.

Answer each question on the verdict form from the facts as you find them. Do not decide who you think should win and then answer the questions accordingly. With respect to each question asked, your answers and your verdict must be unanimous.

In determining whether any fact has been proven in this case, you may, unless otherwise instructed, consider the testimony of all witnesses, regardless of who may have called them, and all exhibits received in evidence, regardless of who may have produced them.

At times during the trial it was necessary for the Court to talk with the lawyers here at the bench out of your hearing, or by calling a recess. We met because often during a trial something comes up that does not involve the jury. You should not speculate on what was discussed during such times.

1.2 Considering Witness Testimony

You the jurors are the sole judges of the credibility of all witnesses and the weight and effect of all evidence. By the Court allowing testimony or other evidence to be introduced over the objection of an attorney, the Court did not indicate any opinion as to the weight or effect of such evidence.

In determining the weight to give to the testimony of a witness, you should ask yourself whether there was evidence tending to prove that the witness testified falsely concerning some important fact, or whether there was evidence that at some other time the witness said or did something, or failed to say or do something, that was different from the testimony the witness gave before you during the trial.

You should keep in mind, of course, that a simple mistake by a witness does not necessarily mean that the witness was not telling the truth as he or she remembers it, because people may forget some things or remember other things inaccurately. So, if a witness has made a misstatement, you need to consider whether that misstatement was an intentional falsehood or simply an innocent lapse of memory; and the significance of that may depend on whether it has to do with an important fact or with only an unimportant detail.

In deciding whether to accept or rely upon the testimony of any witness, you may also consider any bias of the witness.

1.3 How to Examine the Evidence

Certain testimony in this case has been presented to you through a deposition. A deposition is the sworn, recorded answers to questions asked to a witness in advance of the trial. Under some circumstances, if a witness cannot be present to testify from the witness stand, the witness testimony may be presented, under oath, in the form of a deposition. Sometime before this trial, attorneys representing the parties in this case questioned this witness under oath. A court reporter was present and recorded the testimony. This deposition testimony is entitled to the same consideration and is to be judged by you as to credibility and weight and otherwise considered by you insofar as possible the same as if the witness had been present and had testified from the witness stand in court.

While you should consider only the evidence in this case, you are permitted to draw such reasonable inferences from the testimony and exhibits as you feel are justified in the light of common experience. In other words, you may make deductions and reach conclusions that reason and common sense lead you to draw from the facts that have been established by the testimony and evidence in the case.

The testimony of a single witness may be sufficient to prove any fact, even if a greater number of witnesses may have testified to the contrary, if after considering all the other evidence you believe that single witness.

There are two types of evidence that you may consider in properly finding the truth as to the facts in the case. One is direct evidence such as testimony of an eyewitness. The other is indirect or circumstantial evidence—the proof of a chain of circumstances that indicates the existence or nonexistence of certain other facts. As a general rule, the law makes no distinction between direct and circumstantial evidence, but simply requires that you find the facts from all the evidence, both direct and circumstantial.

1.4 Objections to Evidence

Attorneys representing clients in courts such as this one have an obligation in the course of trial to assert objections when they believe testimony or evidence is being offered that is contrary to the rules of evidence. The essence of a fair trial is that it be conducted pursuant to the rules of evidence and that your verdict be based only on legally admissible evidence.

So, you should not be influenced by the objection or by the Court's ruling on it. If the objection is sustained, then ignore the question. If the objection is overruled, then you may treat the answer to that question just as you would treat the answer to any other question.

1.5 Expert Witnesses

When knowledge of a technical subject matter may be helpful to the jury, a person who has special training or experience in that technical field (he or she is called an expert witness) is permitted to state his or her opinion on those technical matters. However, you are not required to accept that opinion. As with any other witness, it is up to you to decide whether the witness's testimony is believable or not, whether it is supported by the evidence and whether to rely upon it. In deciding whether to accept or rely upon the opinion of an expert witness, you may consider any bias of the witness.

2. Contentions of the Parties

I will first give you a summary of each side's contentions in this case. I will then tell you what each side must prove to win on these issues.

This is a patent infringement case. Realtime is the owner of the Patents-in-Suit. As the owner, Realtime has the right to exclude others from using the inventions, and to enforce, sue, and recover damages for past and future infringement of the patents.

The inventions at issue in the Patents-in-Suit relate to improved, particularized systems of digital-data compression to address problems specific to the compression of "digital data".

In this patent-infringement action, Realtime alleges that Riverbed has infringed and continues to infringe certain claims of U.S. Patent Nos. 8,643,513 ("'513 Patent") and 7,415,530 ("'530 Patent") (collectively, the "Patents-in-Suit"). Realtime has asserted the following claims of the Patents-in-Suit (collectively, the "Asserted Claims"):

- ’513 Patent: claim 1; and
- ’530 Patent: claims 1 and 14.

The accused products in this case are SteelHead models 520, 1020, 2020, 1520, 3020, 3520, 5520, 6020, 1050, 2050, 250, 550, 5050, 6050, 7050, CX555, 755, 1555, EX560, 760, 1160, 1260, CX5055, 7055, C255, EX1360, VCX255, VCX555, CX555, CX570, CX770, EX1360, CX3070, 5070, 7070, Steelhead Mobile, and Steelhead Software as a Service (collectively, “Accused Products”). Realtime seeks a reasonable royalty for Riverbed’s alleged infringement.

Riverbed denies Realtime’s contentions and contends that it does not and has not infringed the Asserted Claims of the ’513 or ’530 Patents; it does not and has not induced third parties to infringe the Asserted Claims of the ’513 or ’530 Patents; and that Realtime is not entitled to damages. Riverbed further contends that the following claims are invalid as obvious: claims 1 and 14 of the ’530 Patent.

3. Burdens of Proof

In any legal action, facts must be proved by a required amount of evidence, known as the “burden of proof.” Realtime has the burden of proving infringement and damages by a preponderance of the evidence. Preponderance of the evidence means the evidence that persuades you that a claim is more likely true than not true. If the proof establishes that all parts of one of Realtime’s infringement claims are more likely true than not true, then you should find for Realtime as to that claim.

Riverbed has the burden of proving invalidity by clear and convincing evidence. Clear and convincing evidence means evidence that produces in your mind a firm belief or conviction as to the matter at issue. Although proof to an absolute certainty is not required, the clear and convincing evidence standard requires a greater degree of persuasion than is necessary for the preponderance of the evidence standard. If the proof establishes in your mind a firm belief or conviction, then the standard has been met. Those of you who are familiar with criminal cases will have heard the term "proof beyond a reasonable doubt." That burden does not apply in a civil case and you should, therefore, put it out of your mind in considering whether the parties have met their burdens of proof in this case.

In determining whether any fact has been proved by a preponderance of the evidence or by clear and convincing evidence, you may, unless otherwise instructed, consider the stipulations, the testimony of all witnesses, regardless of who may have called them, and all exhibits received in evidence, regardless of who may have produced them.

4. The Patent Claims

Before you can decide many of the issues in this case, you will need to understand the role of the patent "claims."

The patent claims are the numbered sentences at the end of each patent. The claims are important because it is the words of the claims that define what a patent covers. The figures and text in the rest of the patent provide a description and/or examples of the invention and provide a context for the claims, but it is the claims that define the breadth of the patent's coverage. Each claim is effectively treated as if it were a separate patent, and each claim may cover more or less than another claim. Therefore, what a patent covers depends, in turn, on what each of its claims covers. You will first need to understand what the Asserted Claims cover in order to decide whether or not there is infringement.

Here, Realtime alleges that Riverbed has infringed claim 1 of the ’513 Patent and claims 1 and 14 of the ’530 Patent. You should not attempt to determine infringement of any other claims of any of the Patents-in-Suit.

The law says that it is the Court’s role to define the terms of the claims and it is your role to apply these definitions to the issues that you are asked to decide in this case. Therefore, as I explained to you at the start of the case, I have determined the meaning of certain claim terms at issue in this case, and I have provided to you the definitions of these terms in your juror notebook. You must accept the definitions of these words in the claims as being correct. It is your job to take these definitions and apply them to the issues that you are deciding, including infringement.

The claim language I have not interpreted for you in your notebook is to be given its ordinary and accustomed meaning as understood by one of ordinary skill in the art.

4.1 How a Patent Claim Defines What It Covers

I will now explain how a patent claim defines what it covers.

A claim sets forth, in words, a set of requirements. Each claim sets forth its requirements in a single sentence. If a device or system satisfies each of these requirements, then it is covered by the claim.

In patent law, the requirements of a claim are often referred to as “claim elements” or “claim limitations.” When a thing (such as a product, process, or system) meets all of the requirements of a claim, the claim is said to “cover” that thing, and that thing is said to “fall” within the scope of that claim. In other words, a claim covers a product, process, or system where each of the claim elements or limitations is present in that product, process, or system. Conversely, if the product, process, or system meets only some, but not all, of the claim elements or limitations, then that product, process, or system is not covered by the claim.

4.2 Independent and Dependent Claims

This case involves two types of patent claims: independent claims and dependent claims.

An "independent claim" sets forth all of the requirements that must be met in order to be covered by that claim. Thus, it is not necessary to look at any other claim to determine what an independent claim covers. In this case, claim 1 of the '530 Patent and claim 1 of the '513 Patent are independent claims. Claim 14 of the '530 Patent is a "dependent claim."

A dependent claim does not itself recite all of the requirements of the claim but refers to another claim for some of its requirements. The dependent claim incorporates all of the requirements of the claim to which it refers. In this case, claim 14 of the '530 Patent depends from claim 1. In this way the claim "depends" on another claim. The dependent claim then adds its own, additional requirements. To determine what a dependent claim covers, it is necessary to look at both the dependent claim and any other claims to which it refers. A product or method is covered by a dependent claim if it meets all of the requirements of both the dependent claim and the claim or claims to which the dependent claim refers.

4.3 Open-Ended or "Comprising" Claims

The beginning portion, or preamble, to some of the claims uses the word "comprising." "Comprising" and "comprises" mean "including but not limited to" or "containing but not limited to." Thus, if you decide that an accused product includes all the requirements in that claim, the claim is infringed. This is true even if the accused product includes components in addition to those requirements.

5. Infringement – Generally

Patent law gives the owner of a valid patent the right to exclude others from importing, making, using, offering to sell, or selling the patented invention. Any person or business entity that has engaged in any of those acts without the patent owner's permission infringes the patent.

You can have more than one patent governing an area of technology, although it may relate to different aspects of that technology. The mere fact that Riverbed has patents related to part of the technology of the accused features is not a defense to the fact that someone else may have a patent relating to another part of those features.

I will now instruct you as to the rules you must follow when deciding whether Realtime has proven that Riverbed infringed the Asserted Claims.

5.1 Direct Infringement – Literal Infringement

If any person makes, uses, offers to sell, or sells in the United States or imports into the United States what is covered by the claims of a patent without the patent owner's permission, that person is said to literally infringe the patent. To determine literal infringement, you must compare the accused product or methods with the Asserted Claims, using my instructions as to the meaning of the Asserted Claims.

A patent claim is literally infringed only if an accused product, system, or method includes each and every element in that patent claim. If the accused product, system, or method does not contain one or more of the elements recited in a claim, then that product, system, or method does not literally infringe that claim. If you find that the accused product, system, or method includes each element of the claim, then that product, system, or method literally infringes the claim even if such product, system, or method contains additional elements that are not recited in the claims.

An accused system or product directly infringes a system or product claim if it is reasonably capable of satisfying the claim elements even though it may also be capable of non-infringing modes of operation.

A person may literally infringe a patent even though in good faith the person believes that what it is doing is not an infringement of any patent and even if it did not know of the patent. Literal infringement does not require proof that the person copied a product or the patent.

You must consider each of the Asserted Claims individually. You must be certain to compare each accused product, method, or system with each claim that such product, method, or system is alleged to infringe. Each accused product, method, or system should be compared to the limitations recited in the asserted patent claims, not to any preferred or commercial embodiment of the claimed invention. For infringement, it is improper to compare the claims to a prior art reference.

The same element or method step of the accused product or method may satisfy more than one element of a claim.

If you find that Realtime has proved by a preponderance of the evidence that each and every limitation of an Asserted Claim is present in the accused product or system or is performed by Riverbed in its use of the accused feature or system, then you must find that such product, method, or system infringes that claim.

5.2 Direct Infringement – Doctrine of Equivalents

If you decide that the Accused Product does not literally infringe an Asserted Claim, you must then decide whether it is more probable than not that product infringes the Asserted Claim under what is called the "doctrine of equivalents." Under the doctrine of equivalents, a product can infringe an Asserted Claim if it includes parts that are equivalent to those elements of the claim that are not literally present in the product. If the product is missing an equivalent part to even one element of the Asserted Claim, the product cannot infringe that claim under the doctrine of equivalents. Thus, in making your decision under the doctrine of equivalents, you must look at each individual element of the Asserted Claim and decide whether the product has an equivalent part to the individual claim element(s) that are not literally present in the product.

An equivalent of an element is a component or action that is insubstantially different from the claimed element. To show that an element is insubstantially different, Realtime must show that it performs substantially the same function, in substantially the same way, to achieve substantially the same result as would be achieved by the element that is not literally present in the accused product or method.

In deciding whether any difference between a claim requirement and the product is not substantial, you may consider whether, at the time of the alleged infringement, persons of ordinary skill in the field would have known of the interchangeability of the part or step with the claimed requirement. The known interchangeability between the claim requirement and the part or step of the product is not necessary to find infringement under the doctrine of equivalents.

5.3 Indirect Infringement – Active Inducement of Infringement

Realtime alleges that Riverbed is also liable for indirect infringement by actively inducing others to directly infringe the Asserted Claims. As with direct infringement, you must determine whether there has been indirect infringement by active inducement on a claim-by-claim basis.

Although Realtime need not prove that Riverbed has directly infringed to prove indirect infringement, Realtime must prove that someone has directly infringed. If there is no direct infringement by anyone, Riverbed cannot have actively induced infringement of the patent.

To show active inducement of infringement, Realtime must prove by a preponderance of the evidence that Riverbed's customers, or end-users, have directly infringed the Asserted Claims, and that Riverbed has actively and knowingly aided and abetted that direct infringement. Riverbed is liable for active inducement of a claim only if:

1. Riverbed has taken action during the time the patent is in force which encourages acts by someone else;

2. the encouraged acts constitute direct infringement of that claim;

3. Riverbed (a) was aware of the patent, and knew that the encouraged acts constitute infringement of the patent; or else (b) is willfully blind to the infringement of the patent. Willful blindness requires that Riverbed subjectively believed there was a high probability that the encouraged acts constituted infringement of the patent and Riverbed took deliberate

actions to avoid learning of the infringement;

4. Riverbed had the intent to encourage infringement by someone else; and

5. the encouraged acts are actually carried out by someone else.

In order to prove active inducement, Realtime must prove that each of the above requirements is met by a preponderance of the evidence, i.e., that it is more likely true than not that each of the above requirements has been met.

If you find that Riverbed was aware of the patent, but believed that any acts it encouraged did not infringe that patent, Riverbed cannot be liable for active inducement of infringement.

6. Invalidity – Generally

I'll now instruct you on the rules that you must follow in deciding whether or not Riverbed has proven by clear and convincing evidence that the following claims are invalid: claims 1 and 14 of the '530 Patent.

Patent invalidity is a defense to patent infringement. For a patent to be valid, the invention claimed must be new, useful, and not obvious. A patent cannot take away from people their right to use what was known or what would have been obvious when the invention was made.

An issued patent is accorded a presumption of validity based on the presumption that the United States Patent and Trademark Office, called the PTO, acted correctly in issuing the patent. To prove that any claim of a patent is invalid, Riverbed must persuade you by clear and convincing evidence that the claim is invalid.

Like infringement, validity is determined on a claim-by-claim basis. If one claim of a patent is invalid, this does not mean any other claim is necessarily invalid. Claims are construed the same way for determining infringement.

In making your determination as to validity, you should consider each claim separately. Finally, the manner in which the inventor developed his invention cannot be used to invalidate the patents-in-suit.

6.1 Prior Art

Under the patent laws, a person is granted a patent only if the invention claimed in the patent is new and not obvious in light of what came before. That which came before is referred to as the "prior art."

Prior art may include items that were publicly known or that have been used or offered for sale, or references, such as publications or patents, that disclose the claimed invention or elements of the claimed invention. To be prior art, the item or reference must have been made, known, used, published, or patented either before the date of the invention, or more than one year before the filing date of the patent application. Prior art also includes a patent granted on an application for a patent by another filed in the United States and the application was filed before the patented invention was made.

In this case, Riverbed contends that the following items are prior art:

- U.S. Patent No. 5,870,036, referred to as "Franaszek" and
- U.S. Patent No. 5,247,646, referred to as "Osterlund."

6.2 Invalidity – Obviousness

Riverbed contends that the following claims are invalid as obvious: claims 1 and 14 of the ’530 patent. Even though an invention may not have been identically disclosed or described before it was made by an inventor, in order to be patentable, the invention must also not have been obvious to a person of ordinary skill in the relevant field of technology of the patent at the time the invention was made.

A patent claim is invalid if clear and convincing evidence shows that the claimed invention would have been obvious to persons having ordinary skill in the field of the invention at the time the invention was made.

In determining whether a claimed invention is obvious, you must consider the level of ordinary skill in the field of technology of the patent that someone would have had at the time the claimed invention was made, the scope and content of the prior art, and any differences between the prior art and the claimed invention.

Keep in mind that the existence of each and every element of the claimed invention in the prior art does not necessarily prove obviousness. Most, if not all, inventions rely on building blocks of prior art. In considering whether a claimed invention is obvious, you may but are not required to find obviousness if you find that, as of the priority date of the Patents-in-Suit, there was a reason that would have prompted a person of ordinary skill in the field of the invention to combine the known elements in a way the claimed invention does, taking into account such factors as:

(1) whether the claimed invention was merely the predictable result of using prior art elements according to their known function(s);

(2) whether the claimed invention provides an obvious solution to a known problem in the relevant field;

(3) whether the prior art teaches or suggests the desirability of combining

elements claimed in the invention;

(4) whether the prior art teaches away from combining elements in the claimed invention;

(5) whether it would have been obvious to try the combinations of elements, such as when there is a design need or market pressure to solve a problem and there are a finite number of identified, predictable solutions;

and

(6) whether the change resulted more from design incentives or other market forces.

To find that prior art rendered the invention obvious, you must find that the prior art provided a reasonable expectation of success. Obvious to try is not sufficient.

In determining whether the claimed invention was obvious, consider each claim separately. Do not use hindsight, i.e., consider only what was known at the time of the invention.

In making these assessments, you should take into account any objective evidence (sometimes called "secondary considerations") that may shed light on the obviousness or not of the claimed invention, such as:

(1) Whether the invention was commercially successful as a result of the merits of the claimed invention (rather than the result of design needs or market-pressure advertising or similar activities);

(2) Whether the invention satisfied a long-felt need;

(3) Whether others had tried and failed to make the invention;

(4) Whether there were changes or related technologies or market needs contemporaneous with the invention;

(5) Whether others had skepticism about the invention or its likelihood of working;

(6) Whether the invention achieved unexpected results;

(7) Whether others in the field praised the invention;

(8) Whether persons having ordinary skill in the field of the invention expressed surprise or disbelief regarding the invention;

(9) Whether others sought or obtained rights to the patent from the patent holder; and

(10) Whether the inventor proceeded contrary to accepted wisdom in the field.

Although you should consider any evidence of these factors, the relevance and importance of any of them to your decision on whether the claimed invention would have been obvious is up to you.

6.3 Level of Ordinary Skill

A person of ordinary skill at the respective times of the alleged inventions of the '530 Patent would have had at least an undergraduate degree in electrical engineering, computer science, or a related field, and two years of experience in information processing, including compression and storage. Alternatively, a person of ordinary skill with less than the amount of educational training noted above could have had a correspondingly greater amount of experience in the relevant technologies.

7. Damages – Generally

I will now instruct you on damages. If you find that Riverbed has infringed any valid Asserted Claims, you must determine the amount of money damages to which Realtime is entitled for that infringement.

The amount of damages must be adequate to compensate Realtime for the infringement. At the same time, your damages determination must not include additional sums to punish Riverbed or to set an example. You may award compensatory damages only for the loss that Realtime proves was more likely than not caused by Riverbed's infringement.

Realtime seeks damages in the form of a reasonable royalty. Generally, a reasonable royalty is the reasonable amount that someone wanting to use the patented invention should expect to pay to the patent owner and the patent owner should expect to receive.

7.1 Damages – Burden of Proof

Where the parties dispute a matter concerning damages, it is Realtime's burden to prove the amount of damages by a preponderance of the evidence. Realtime must prove the amount of damages with reasonable certainty, but need not prove the amount of damages with mathematical precision. However, Realtime is not entitled to damages that are remote or speculative. In other words, you should award only those damages that Realtime establishes that it more likely than not suffered.

7.2 Damages – Date Damages Begin

In determining the amount of damages, you must determine when the damages began.

For the '530 Patent, damages related to direct infringement begin on May 8, 2009, which is six years before filing of this lawsuit.

For the '513 Patent, damages related to direct infringement begin on the date the patent issued, which is February 4, 2014.

7.3 Damages – Method Claims

In order to recover damages for infringement of a method claim, Realtime must either prove that the Accused Product necessarily infringes the Patents-in-Suit or prove acts of direct infringement by Riverbed.

7.4 Damages – Indirect Infringement

Keep in mind that any damages you award for indirect infringement by Riverbed through active inducement of its customers to commit infringement cannot begin until you find that Riverbed had actual knowledge of and intent to cause its customers' direct infringement, if any. Further, because the amount of damages for induced infringement is limited by the number of instances of direct infringement, Realtime must further prove the number of direct acts of infringement of the Patents-in-Suit, for example, by showing specific individual acts of direct infringement or by showing that a particular class of products directly infringes.

7.5 Damages – Reasonable Royalty

A reasonable royalty is the amount of money a willing patent owner and a willing prospective licensee would have agreed upon at the time the infringement began for a license to make, use, or sell the invention. It is the royalty that would have resulted from an arms-length negotiation between a willing licensor and a willing licensee. This is known as the hypothetical negotiation. Unlike in a real world negotiation, all parties to the hypothetical negotiation are presumed to believe that the patent is infringed and valid.

In considering this hypothetical negotiation, you should focus on what the expectations of the patent owner and the infringer would have been had they entered into an agreement at that time, and had they acted reasonably in their negotiations. The reasonable royalty you determine must be a royalty that would have resulted from the hypothetical negotiation, and not simply a royalty either party would have preferred. One way to determine a reasonable royalty is to multiply a reasonable royalty base by a reasonable royalty rate.

The parties agree that the date of the hypothetical negotiation between Riverbed and Realtime for infringement of any of the Asserted Claims of the ’530 Patent would have been in August 2008. If you find that the Asserted Claims of the ’530 Patent are not infringed or are invalid, but one or more of the Asserted Claims of the ’513 Patent are infringed and valid, then the date of the hypothetical negotiation between Riverbed and Realtime would be February 2014.

In making your determination of the amount of a reasonable royalty, it is important that you focus on the time period when Riverbed first infringed that patent and the facts that existed at that time. However, evidence of things that happened after the infringement first began may be considered in evaluating the reasonable royalty only to the extent that the evidence aids in assessing what royalty would have resulted from a hypothetical negotiation. Your determination does not depend on the actual willingness of the parties to this lawsuit to engage in such negotiations. Your focus should be on what the parties’ expectations would have been had they entered negotiations for royalties at the relevant time.

When determining a reasonable royalty, you may consider evidence concerning the amounts that other parties have paid for rights to the patents in question, or for rights to similar technologies. A license agreement need not be perfectly comparable to a hypothetical license that would be negotiated between Realtime and Riverbed in order for you to consider it. However, if you choose to rely upon evidence from any license agreements, you must account for any differences between those licenses and the hypothetically negotiated license between Realtime and Riverbed when you make your reasonable royalty determination including, the type of technology licensed, whether the license contained a cross-license and/or similar patent protections, whether the license contained any value related to a release of liability, the date when the license was entered, the financial or economic conditions of the parties at the time the parties entered into the license, the extent of use (if any) of any particular licensed patents, the number of patents involved in the license, whether or not the license covered foreign intellectual property rights, the extent to which litigation may have affected the license, and whether, contrary to the hypothetical negotiation, the licensee in the real world license, at the time of entering the license, believed that the patents were either not infringed or were invalid.

The reasonable royalty award must be based on the value that the patented invention adds to the accused products. When the infringing products have both patented and unpatented features, measuring this value requires a determination of the value added by the patented features. The ultimate combination of royalty base and royalty rate must reflect the value attributable to the infringing features of the product, and no more.

7.6 Royalty Base

In this case, Realtime contends that Riverbed's sales of the Accused Products leads to sales of related services that should be considered in determining the royalty base. The parties agree that these related services do not infringe the patents. In order to consider the sales of these related services in the royalty base, the services must function together with the accused products in some manner so as to produce a desired end product or result. The services and accused products together must be analogous to components of a single assembly, or they must constitute a functional unit. Items that have essentially no functional relationship to the patented invention and that may have been sold with an infringing device only as a matter of convenience or business advantage cannot be considered in the royalty base.

7.7 Reasonable Royalty Factors

In deciding what is a reasonable royalty that would have resulted from the hypothetical negotiation, you may consider the factors that the patent owner and the alleged infringer would consider in setting the amount the alleged infringer should pay.

I will list for you a number of factors you may consider. This is not every possible factor, but it will give you an idea of the kinds of things to consider in setting a reasonable royalty.

(1) The royalties received by the patentee for licensing of the patents-in-suit, proving or tending to prove an established royalty.

(2) Royalties paid for other patents comparable to the patents-in-suit.

(3) The nature and scope of the license, as exclusive or nonexclusive; or as restricted or nonrestricted in terms of territory, or with respect to the parties to whom the product may be sold.

(4) Whether or not the licensor had an established policy and marketing program to maintain its patent exclusivity by not licensing others to use the invention or by granting licenses under special conditions designed to preserve that exclusivity.

(5) The commercial relationship between the licensor and licensee, such as whether they are competitors in the same territory and the same line of business, or whether they are inventor and promoter.

(6) Whether being able to use the patented invention helps in making sales of other products or services, such as convoyed sales.

(7) The duration of the patent and the term of the license.

(8) The established profitability of the product made under the patents, its commercial success, and its current popularity.

(9) The utility and advantages of the patented invention over the old modes or devices, if any, that had been used for achieving similar results.

(10) The nature of the patented invention, the character of the commercial embodiment of it as owned and produced by the licensor, and the benefits to those who have used the invention.

(11) The extent of the licensee's use of the patented invention and any evidence probative of that use.

(12) The portion of the profit or of the selling price that may be customary in the particular business or in comparable business to allow for the use of the invention or analogous inventions.

(13) The portion of the profits that is due to the patented invention, as compared to the portion of the profit due to other factors, such as unpatented elements or unpatented manufacturing processes, or features or improvements developed by the licensee.

(14) Expert opinions as to what would be a reasonable royalty.

(15) The amount that a licensor and a licensee would have agreed upon if both sides had been reasonably and voluntarily trying to reach an agreement; that is, the amount which an accused infringer would have been willing to pay as a royalty and yet be able to make a reasonable profit and which amount would have been acceptable to a patent owner if it would have been willing to create a license.

No one factor is dispositive and you can and should consider the evidence that has been presented to you in this case on each of these factors.

Realtime has relied on license agreements in which royalties were based on a percentage of the entire price of the smallest saleable patent practicing licensed end-products, but in determining a reasonable royalty, you must not rely on the overall price of Riverbed's accused products at issue in this case. Damages for patent infringement must be apportioned to reflect the value the invention contributes to the accused products or features and must not include value from the accused products or features that is not attributable to the patent.

8. Instructions for Deliberations

You must perform your duties as jurors without bias or prejudice as to any party. The law does not permit you to be controlled by sympathy, prejudice, or public opinion. All parties expect that you will carefully and impartially consider all the evidence, follow the law as it is now being given to you, and reach a just verdict, regardless of the consequences.

You should consider and decide this case as a dispute between persons of equal standing in the community, of equal worth, and holding the same or similar stations in life. All persons, including corporations, and other organizations stand equal before the law, regardless of size or who owns them, and are to be treated as equals.

When you retire to the jury room to deliberate on your verdict, you may take this charge with you as well as exhibits, which the Court has admitted into evidence. Select your Foreperson and conduct your deliberations. If you recess during your deliberations, follow all of the instructions that the Court has given you about your conduct during trial. After you have reached your verdict, your Foreperson is to fill in on the form your answers to the questions. Do not reveal your answers until such time as you are discharged, unless otherwise directed by me.

Any notes that you have taken during this trial are only aids to memory. If your memory should differ from your notes, then you should rely on your memory and not on the notes. Your notes are not evidence. A juror who has not taken notes should rely on his or her independent recollection of the evidence and should not be unduly influenced by the notes of other jurors. Notes are not entitled to any greater weight than the recollection or impression of each juror about the testimony.

If you want to communicate with me at any time, please give a written message or question to the Court Security Officer, who will bring it to me. I will then respond as promptly as possible either in writing or by having you brought into the courtroom so that I can address you orally. I will always first disclose to the attorneys your question and my response before I answer your question.

After you have reached a verdict, you are not required to talk with anyone about the case unless the Court orders otherwise.